

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-2075

To be argued by
HENRY J. STEINGLASS

United States Court of Appeals

For the Second Circuit

ALBERT VICTORY,
Petitioner-Appellee,
against

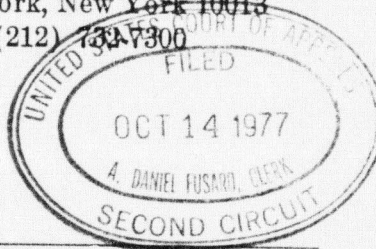
ROY BOMBARD, as Superintendent of
Greenhaven Correctional Facility,
Respondent-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR RESPONDENT-APPELLANT

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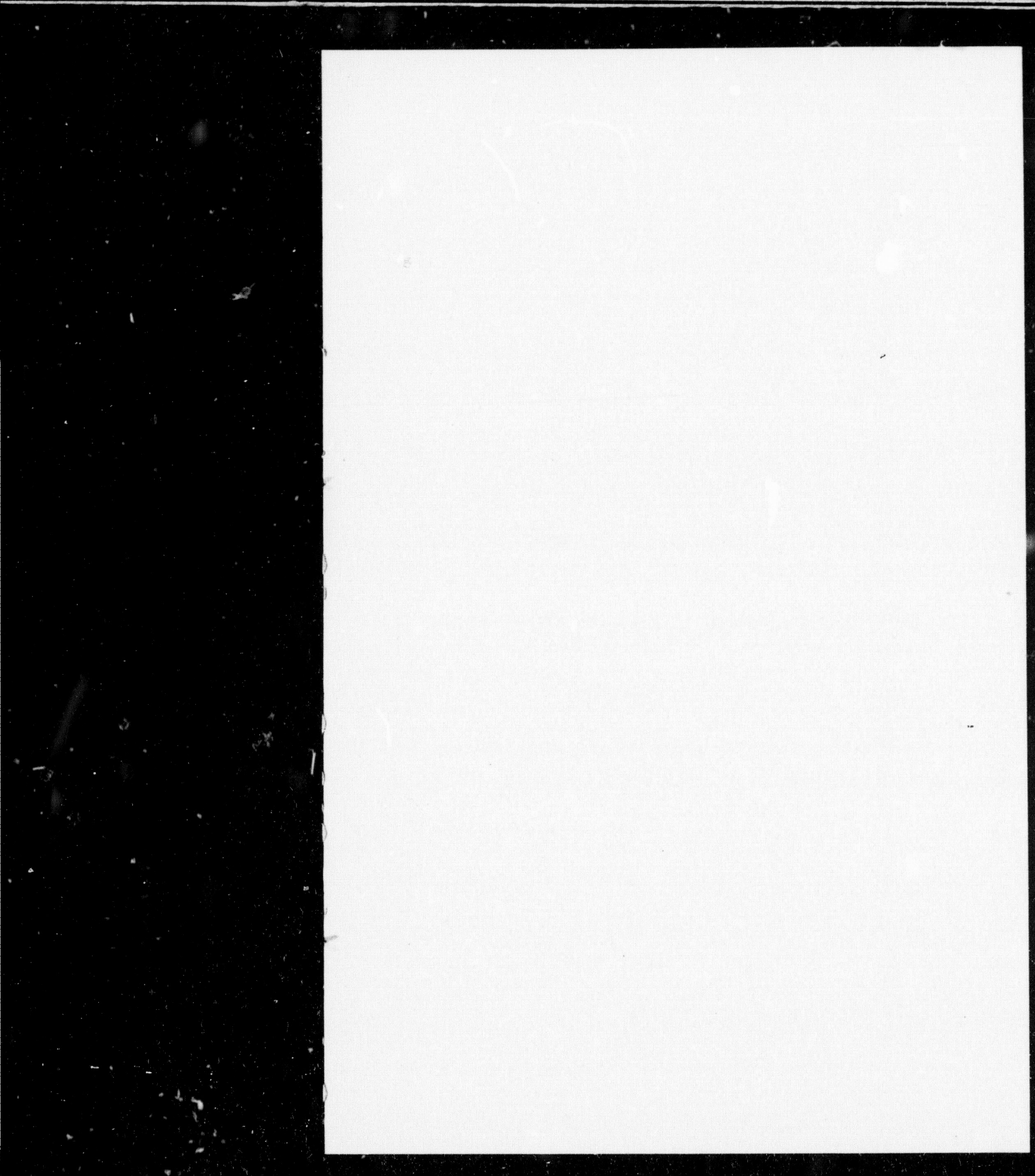


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Petitioner-Appellee,
against

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Respondent-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR RESPONDENT-APPELLANT

Introduction

The Brief for Petitioner-Appellee advances two claims which, though presented below, were not the basis for the District Court's grant of habeas corpus relief and, accordingly, were not addressed in the State's main brief. First, Victory claims that his Sixth Amendment right of confrontation was denied when the trial judge ruled that he could not introduce for impeachment purposes evidence that a prosecution witness did not mention on a prior

occasion a fact to which he testified at trial. The District Court rejected this claim (71a-72a).^{*} Second, Victory claims that New York's affirmative defense to felony murder is unconstitutional. The District Court did not pass on this claim (89a).

This Reply Brief first replies to Victory's arguments with respect to the claim upon which the District Court did grant relief, that is, the claim regarding the adequacy of the jury instructions. We then respond to Victory's two additional claims.

POINT I

The instructions to the jury were proper and do not present an issue of constitutional dimension [replying to brief for petitioner-appellee, Point I].

Our main brief showed that this was not the rare case in which the adequacy of language used in jury instructions in a state trial presents an issue of constitutional dimension. There was no erroneous instruction in this case. There was no failure to charge on an element of the crime. The concept on which the District Court thought the instructions were inadequate—that, in order to convict Victory of felony murder, the jury had to find that he was in the process of committing the underlying felony of escape at the time the officer was shot—was a simple one and was

^{*} References followed by "a" are to pages of the Joint Appendix on this appeal. Unless otherwise indicated, numbers in parentheses refer to pages of the printed record on appeal in the state courts, which has been transmitted to this Court; numbers preceded by "VD" refer to pages of the minutes of the jury selection contained in volumes 1 through 4 of that record.

stated by the trial judge eight times. Moreover, that issue was repeatedly emphasized throughout the trial in the summations by both the prosecutor and by Victory's attorney, and also during the lengthy jury selection process and in the opening statement.

In his brief, Victory's first response is to suggest that the jury instructions should be evaluated as if the evidence against Victory was very weak, indeed, insufficient to prove Victory's guilt of felony murder beyond a reasonable doubt. It is asserted that "only by unsupportable inferences" could the jury find that Victory and Bornholdt were participating together in an escape, and that there was "even less basis" for determining when that escape began; indeed, that it "was as likely as not" that Victory did not "entertain the idea of leaving" until after the officer was shot (p. 19). Victory's brief portrays Victory as trying to "calm the situation" and standing by obeying the officer's order to get against the wall, immediately before Bornholdt shot the officer (*id.*, pp. 5-6). Indeed, the brief claims that Victory was a victim of the "injustice of felony murder" (*id.*, p. 48, n.).

Victory's characterization of the evidence as weak or insufficient is entirely inaccurate. There was overwhelming evidence that from the very beginning Victory had no intention of submitting to the officer's authority, that as soon as Victory was placed under arrest he tried to escape, that he continued his efforts to escape, in which Bornholdt joined, and that Victory and Bornholdt were in the process of escaping when Bornholdt shot and killed the officer. Indeed, the uncontradicted evidence shows that it was Victory who was the prime mover throughout the incident.

It was Victory who, when approached by a uniformed police officer demanding license and registration, denied that he and Bornholdt, who was carrying a fully loaded automatic pistol, had been in the car which the officer had observed speeding and running red lights in midtown Manhattan. In fact, Victory had been driving with his license revoked. It was Victory who then started to enter Arthur's and, finding his way barred by the officer's nightstick, reacted by grabbing the officer by the collar and lifting him up. Although Patrolman Varecha was a "nice cop" (defense summation: 2729), and merely threatened to have the car towed away if license and registration were not produced, Victory continued to grapple with the officer.

Told that he was under arrest, it was Victory who responded by again grabbing the officer's coat, and this time kneeling the officer hard in the groin. As the officer doubled over, Bornholdt jumped on the officer's back, and then Victory as well as Bornholdt punched the officer with his fists.

The officer subdued the two men with his nightstick—aided by a bystander (Francisco Garcia) who jumped on Bornholdt—and the officer then drew his gun and told both men (Victory for the second time) that they were under arrest. Victory then, together with Bornholdt, continued to try to get away from the officer, the two men maneuvering so that the injured officer could not focus on both simultaneously. It was Victory who, while saying he didn't want any trouble, kept backing away as the officer, bent down in pain, was trying to follow Victory and telling him to stop and get against a car. It was Victory who, despite the officer's order not to do so, moved away into a nearby alley

—used as a parking lot but then empty—which, though well lit, was out of sight of the other people standing under the canopy at Arthur's.

It was Victory who came up next to the officer, occupying his attention while Bornholdt made a wide circle out of the alley onto the sidewalk and approached the officer from the rear. As the officer struggled with Victory to get him against the wall, it was Victory who then swung round and started fighting with the officer as Bornholdt jumped the officer from behind. After Victory, as well as Bornholdt, then got the officer into the alley, it was Victory who, facing Bornholdt as well as Garcia, said "get the cop" or "get a cop. This guy is crazy." When Garcia did not leave the alley but instead said "I'm with the cop" and went to the officer, it was Victory who said to Garcia, "get the fuck out of here," which Bornholdt then repeated. Then, as Garcia moved away to the mouth of the alley and, hearing shots, looked back, it was Victory whom he saw scuffling with the officer as the last of the shots was fired from Bornholdt's gun.

As the officer staggered towards the mouth of the alley, Victory first "hugged" the wall of the alley and then ran from the alley towards Lexington Avenue, only seconds behind Bornholdt. Despite the shouts of "Stop Police" from off-duty police officers coming from Arthur's, Victory continued to run. When warning shots were fired in the air, Victory crouched down lower and kept on running. At the corner of Lexington Avenue and 54th Street, when one of the police officers caught up with Victory, shouting that he was a police officer and ordering Victory to stop

or he would be shot, Victory struggled with that officer and broke away, continuing to run until he was finally caught and subdued. And, brought back to the alley and being accused by Garcia of complicity in the shooting, Victory claimed that he was "with my wife."**

In sum, there was overwhelming evidence from which the jury could find that Victory and Bornholdt were in the process of escaping from Patrolman Varecha when Bornholdt shot and killed the officer.

* * *

As detailed in our main brief, there were numerous occasions throughout the trial when the prosecutor and defense counsel addressed the issue of whether Victory was in the process of escaping when the officer was shot. Victory's brief attempts to dismiss these portions of the record as "explanations of law" by counsel, offered here by the State to "cure an improper charge" (pp. 20, 22). But, there was no error in the charge, and counsel were not expounding on legal theory but were expressing a simple legal concept which was the focal point of the case, as far as Victory was concerned. The point was not only made extensively during jury selection, but both summations framed that issue as the central issue concerning Victory and then reviewed the evidence in that light.** Such repeated emphasis by prosecution and

*A full summary of the evidence at trial, with page references to the record, appears in the Addendum to our main brief.

** Victory's brief is mistaken in suggesting that the trial judge instructed the jury to disregard these statements by the prosecutor and defense counsel. In the passage in the voir dire which the brief terms "noteworthy in this respect" (p. 22), Victory's attorney said, "I would like to explain the crime for which my client is charged." The

(footnote continued on next page)

defense alike, as well as by the trial judge, is highly significant since the question here is whether, considering the judge's charge as a whole and the entire trial, the instruction claimed to be inadequate "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973).

Moreover, the basis for the District Court's ruling was an assumption that a question from the jury during deliberations showed that the jury was confused about whether, to convict Victory of the felony murder charge, it had to find that he intended to escape prior to the shooting (89).^{*} Such an assumption is unwarranted where the record shows that throughout the trial that point was repeatedly driven home to the jury not only by the trial judge's numerous instructions but also by the prosecutor and by Victory's attorney.

Victory's brief presents "four answers" to the point made in our main brief (pp. 30-32) that the jury's question

trial judge replied, "Go ahead" (VD 1065), and Victory's attorney then proceeded to do so in the passage quoted at p. 9 of our main brief. The passage quoted at p. 22 of Victory's brief came at the end of the defense summation after Victory's attorney stated, "the Court is going to charge you with respect to affirmative defenses in this case. The Court will instruct you as to what the law is." (2846). Throughout his summation, Victory's attorney, without any limitation by the trial judge, repeatedly addressed the issue of whether Victory was in the act of escaping when the police officer was shot. (See pp. 11-14 of our main brief.) The assertion in Victory's brief that the trial judge was "hostile" to the defense, is completely unwarranted and irrelevant. The point, when raised on direct appeal, was fully answered (see pp. 94-99 of the State's brief in the New York Court of Appeals, a copy of which was before the District Court and has been transmitted to this Court), and merits no discussion here.

^{*} The question was, "as a matter of law, does the fact of flight after the shooting itself establish escape in the second degree after an arrest has been made for felony assault?" (3174)

does not necessarily show that the jury was confused about felony murder, but is readily understandable as asking about a different matter—the crime of Escape in the Second Degree. In reply, we would note that the crime of Escape in the Second Degree was a crime which had itself been submitted to the jury for verdict (3087-88). The question was by its terms a question about “escape in the second degree,” and the trial judge answered the question in those terms, giving the jury a correct explanation of the elements of that crime.

Then, the trial judge added two reminders to the jury that, in order to convict of felony murder, it had to find that Victory was in the process of escaping at the time the officer was shot. The judge not only re-read the applicable portion of the statute, which clearly conveyed this simple concept, but he then added an unmistakably clear explanation. He told the jury that the defendants were charged with felony murder “in that the death of Patrolman John Varecha was caused while each was engaged in the commission of the crime of escape in the second degree.” (3179). These were the last instructions given to the jury before it retired for its final deliberations and reached a verdict of guilty on the felony murder charge.

Victory also argues that the use of the statutory language “or in immediate flight therefrom” in the judge’s charge may have led the jury to believe that immediate flight from the murder, as opposed to flight from the underlying felony, would have been sufficient to convict Victory of felony murder. The District Court suggested

this possibility in a footnote to its opinion (91a, n.4). But, the word "therefrom" clearly refers to flight from the underlying felony, which in this case was escape, and not from the killing. The trial judge stated:

A person is guilty of felony murder when, acting either alone or with one or more other persons, he commits or attempts to commit escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants. (3052)

Moreover, there were several instructions given by the trial judge which explained the statutory language and made it clear that the escape had to be in progress when the shooting occurred in order for the defendants to be guilty of felony murder. For example, after using the statutory language, the trial judge explained:

Now stated simply, this means that the prosecution must show that the defendants intended to commit escape in the second degree, the felony underlying the commission of the alleged killing; and in the course of committing that crime, the defendants, or either of them, acting together, caused the death of Patrolman Varecha (3052-53; see also 2969, 2984, 3051, 3179).

Notably, Victory's attorney took no exception (see 3091-95) to the trial judge's main charge concerning felony murder, which, by giving these explanations of the statutory language, amply conveyed the substance of Victory's request to charge on the elements of that crime (3489-90).

Victory's final point here is that this case is unlike *Henderson v. Kibbe*, — U.S. —, 97 S. Ct. 1730, 52

L. Ed. 2d 203 (May 16, 1977). Victory asserts that "the word 'causes' is one of ordinary usage and easily understood." (Victory's brief, p. 29). But, it was precisely the absence of guidance from the trial judge concerning the complex nature of legal causation, which involves such concepts as intervening and supervening causes, and foreseeability, which made the claim of inadequate jury instructions in *Kibbe* a colorable one. In contrast, in this case the legal concept which the District Court thought was inadequately presented to the jury was simply one of timing—was Victory committing the underlying felony when the officer was shot. That simple concept was stated to the jury over and over again by the trial judge, and by the prosecutor and defense counsel as well. Accordingly, there is no constitutional dimension to Victory's claim that the jury instructions were inadequate.

POINT II

There was no significance to the fact that a prosecution witness, who had told authorities on the night of the crime that the deceased had been kicked in the groin, had not mentioned that fact to authorities at another time that same night when he was not asked about it [answering the brief for petitioner-appellee, Point II].

Victory claims that he was denied the Sixth Amendment right of confrontation because he could not impeach a prosecution witness by showing that on a prior occasion the witness had not stated that the deceased police officer had been kicked in the groin before he was shot. In support

of this claim, Victory argues that the witness, Francisco Garcia, never told authorities that fact on the night of the murder.

However, it is clear from the record, and it was undisputed at trial, that Garcia did tell an assistant district attorney on the night of the crime that Patrolman Varecha had been kicked in the groin. Since Garcia clearly did mention the kick to the assistant district attorney that night, there was no significance in whether he mentioned it at another time that night when he was not asked about it. Accordingly, Victory was not denied the right of confrontation by the trial judge's ruling, which was within a fair range of discretion, that the material Victory offered was not inconsistent with his trial testimony and was therefore inadmissible for impeachment purposes.

At about 1 o'clock in the morning on October 7, 1968, Francisco Garcia, a businessman from Maryland visiting New York, was leaving Arthur's with his wife, niece and a third woman, when Victory and Bornholdt arrived, followed by Patrolman Varecha. During the ensuing incident, Garcia attempted without success to assist Patrolman Varecha. Garcia continued to stay close to the officer as Victory and Bornholdt drew the officer into the alley where the fatal shots were fired. Garcia attempted to comfort the officer when he collapsed at the mouth of the alley. After Patrolman Varecha was rushed to the hospital, Garcia, his wife, and the two other women went to the 17th Precinct station-house and remained there for several hours.

During these early morning hours, Garcia talked about the shooting several times. He spoke to an Assistant District Attorney, Kenneth Dannett ("ADA Dannett"), and

mentioned among other things, that Patrolman Varecha had been kicked in the groin during the incident. ADA Dannett's contemporaneous notes of this conversation in the police station that night, read:

Patrolman kicked and holding himself in groin. Kicked in scuffle (15a).

Later that same night, at about 4:45 a.m., Garcia spoke to ADA Gannett again, this time with a stenographer present. This interview consisted largely of a narrative by Garcia. ADA Dannett did not ask about the officer having been kicked in the groin, and Garcia did not mention it. Garcia did say that, as the officer and the two men moved away from Arthur's, "they started hitting the policeman" (28a). Garcia was not asked to describe the manner in which the officer had been struck, but was asked about other matters which occurred at that point—the officer's actions to subdue his assailants and Garcia's own attempt to come to the officer's assistance (28a). Garcia answered these questions and then continued his narrative of how Victory had walked away from the officer into the alley and how the officer had been shot, about which there were a number of specific questions (30a-33a).

Garcia also spoke that night to a detective, Donald Byrne. In his handwritten notes made during this interview, Detective Byrne wrote:

cop then hit the other guy (driver) in the head with his club—I jumped on tan guys back & the tan one struck him & kicked him in the groin * * * (19a).*

* "The tan one" refers to Bornholdt, the driver to Victory.

By the phrase "kicked him in the groin," the handwritten notes indicate that Garcia told Detective Byrne that night that the police officer had been kicked in the groin. Garcia read over these handwritten notes at about 4:00 or 5:00 a.m. (1184) and, asked Detective Byrne whether these notes were accurate, they were "close" (Garcia: 1185-86, 1305).

A typed version of Detective Byrne's handwritten notes differs from the handwritten notes themselves. The typewritten version states, "kicked me in the groin" (23a), referring to Garcia himself as being kicked; it does not indicate that Garcia said that the officer was kicked in the groin. The typewritten version was never seen by Garcia prior to trial (Garcia: 1178-79).

At the end of October 1968, Garcia testified before the grand jury concerning the killing of Patrolman Varecha. He described the incident in detail and stated that the officer had been kicked in the groin by Victory (46a-48a).

Garcia, his wife and the two other women testified at trial. On direct examination Garcia described how the officer had been kicked in the groin during the incident. Garcia was a few feet away when the officer told "the man in blue" (Victory) that he was under arrest. Victory then turned, looked "the man in tan" (Bornholdt) "straight in the eyes," and said, "I'll take care of this." Bornholdt turned around and told Garcia to "get the fuck out of there." Victory then grabbed the officer by the collar of his rain coat, brought his knee up hard into the officer's groin and started punching the officer. Bornholdt jumped on the officer's back and also punched the officer. Garcia tried to grab Bornholdt. The officer pushed Bornholdt and

Victory away and struck them in the heads with his nightstick drawing blood. The officer said, "You are under arrest." Bornholdt kicked at Garcia several times. The officer was holding himself between his legs with his left hand, moaning, and getting his revolver out from under his raincoat (Garcia: 1041-50).

At the end of Garcia's direct examination, five items of "Rosario" material* were turned over to defense counsel (1068-69):

- (1) ADA Dannett's handwritten notes of his conversations with Garcia in the early morning hours of October 7, 1968 (13a);
- (2) Stenographic minutes of a statement by Garcia to ADA Dannett beginning at 4:45 a.m. on October 7, 1968 (24a);
- (3) Detective Byrne's handwritten notes of his conversation with Garcia at about 2:15 a.m. on October 7, 1968 (17a);
- (4) A typed summary of Detective Byrne's notes (22a);
- (5) Minutes of Garcia's grand jury testimony (36a).

Victory's attorney retained this material overnight and began his cross-examination the following morning (1168).** At the outset, he offered into evidence Detective Byrne's handwritten notes paraphrasing what Garcia had told him.

* *People v. Rosario*, 9 N.Y. 2d 286 (1961).

** Cross-examination by Bornholdt's attorney (1074-1162; 93 pages) took up the afternoon following Garcia's direct examination.

Victory's attorney stated, however, that he was "*not* using it for purposes of impeaching him at this point * * *." (1181) (emphasis added). The trial judge ruled that the offer would not be accepted, but told Victory's attorney "you can examine him all you want. You are not restricted in your examination." (1183).

Victory's attorney continued his cross-examination, filling 130 pages of the record (1177-1307). On several occasions Victory's attorney asked Garcia if he had said something different about the incident on prior occasions (see, e.g., 1219-20, 1226-27, 1275-77). No restriction was placed on such cross-examination of Garcia by "prior inconsistent statement."

With respect to Garcia's testimony that the police officer had been kicked in the groin, Victory's attorney did not ask Garcia whether he had said anything different on prior occasions about the officer being kicked. In particular, Victory's attorney did not ask Garcia whether he had told Detective Byrne that "the tan one," i.e., Bornholdt, rather than "the driver," i.e. Victory, had kicked the officer in the groin. Instead, Victory's attorney cross-examined Garcia about whether on the night of the crime he had said anything at all about Patrolman Varecha having been kicked in the groin.

In particular, Victory's attorney asked Garcia whether he had told Detective Byrne that the officer had been kicked in the groin. Garcia replied that he thought he had (1187-89, 1289).^{*} Victory's attorney also asked

^{*} Objection to the question "Do you see it" in the handwritten notes, which had not been introduced into evidence, was sustained.

Garcia whether he had told ADA Dannett that Victory had kneed or kicked the police officer. Garcia replied, "yes, when I was telling him about the case"(1282).

Victory's attorney had ADA Dannett's notes of his conversation with Garcia on the night of the crime showing that he had told ADA Dannett that night that the police officer had been kicked in the groin. Nevertheless, Victory's attorney proceeded to suggest to the jury that Garcia had never, at any time while at the police station on the night of the crime, said anything at all about the officer being kicked in the groin. Victory's attorney said to Garcia:

Isn't that the fact, that you never mentioned any kneeling or kicking until the time that you were called to testify before the Grand Jury? (1286).

Victory's attorney asked to have that question repeated, even after the prosecutor had, at the bench, expressed his objection that in view of ADA Dannett's notes, counsel's insinuation was "outrageous" (1287).

The trial judge then himself asked Garcia whether he had told ADA Dannett about the kick before he went before the grand jury, to which Garcia replied that he had (1287-88). Garcia stated that ADA Dannett was writing at the time Garcia told him this (1288). Garcia's conversation with ADA Dannett took place "sometime during the course of the evening" (1285). Garcia also said that he thought he had told ADA Dannett this in the presence of the stenographer as well (1288).

Shortly thereafter, Victory's attorney, in the form of a question to Garcia, read at length from the stenographic minutes (1291-98). When an objection was sustained be-

cause he was reading from something which was not in evidence (1299), Victory's attorney said that he wanted to point out that the minutes did not refer to the police officer being kicked by Victory (1299, 1302). The trial judge said to Victory's attorney, "you know perfectly well he [Garcia] said to Mr. Dannett [about the officer being kicked in the groin] because of his [Dannett's] notes" (1300). Victory's attorney in no way took issue with the fact that the notes taken by ADA Dannett (who was present at the trial, but was not the trial assistant), were taken in the police station that night, before ADA Dannett interviewed Garcia in the presence of a stenographer (1301).

The trial judge stated:

The question is whether there is anything in this statement [the stenographic minutes] which is inconsistent with what he said there [at trial].

It might not have been as complete as his testimony on the stand, because that was the subject of intensive interrogation, both on direct and cross (1302).

The trial judge then ruled that the lack of mention of the kick in the stenographic minutes was not "inconsistent" with Garcia's trial testimony and therefore the minutes were not admissible for impeachment purposes.*

Victory's attorney then again elicited from Garcia, as he had earlier (1177-79, 1184-89, 1272-73), that Garcia had

* Later, Victory's attorney called the stenographer who took and transcribed those minutes and then offered the minutes again (2482-83). Victory's attorney also offered to call ADA Dannett to testify that he asked certain questions while the stenographer was present and that Garcia's answers were recorded (2485). Since the judge had previously ruled that there was no inconsistency between the lack of mention of the kick in the stenographic minutes and Garcia's trial testimony, these offers were rejected (2482-83, 2485-87).

spoken to Detective Byrne on the night of the crime, and that Detective Byrne had taken notes. Garcia had read over the detective's handwritten notes (about 4:00 or 5:00 a.m. (1184)), and had agreed with the detective that the latter's notes were "close" to being accurate (1303-06).^{*} Victory's attorney then asked about what Garcia had said to Detective Byrne (1306).^{**} There was an objection. Victory's attorney had apparently been reading from something not in evidence. He did not offer that material into evidence. He did not inform the judge that his purpose was to bring out any prior inconsistent statement, either by showing that Garcia had previously said something different from his trial testimony or by showing that Garcia had not mentioned on a prior occasion a fact to which he was testifying at trial. Victory's attorney made no reference to Garcia's testimony that the officer had been kicked in the groin. The objection was sustained. Victory's attorney then ended his cross-examination.

Later, in the defense case, Victory's attorney called Detective Byrne to the stand. When an offer of proof was requested, it developed that he had called Detective Byrne for a very limited purpose. Counsel's offer was that on the night of the crime, Detective Byrne had asked Garcia what had occurred and, counsel continued, Detec-

^{*} When these notes were shown to Garcia earlier in the cross-examination, Garcia said, "everytime I go over it" "I am recalling little things that were left out." (1186)

^{**} Victory's attorney asked:

"Do you recall telling Detective Byrne that the police officer said I'll have your car towed away and turned around to leave the driver followed him, talking to him, and the cop put his club up lengthwise and pushed him away, and the driver grabbed him by the coat—" (1306).

tive Byrne "took down everything that was said to him by Mr. Garcia", "he took down all of the answers and all of the questions and that that (sic) makes up what is now People's Exhibit 25 for identification [the handwritten notes] and People's Exhibit 26 for identification [the typed version]" (2499). Victory's attorney stated that the purpose of this offer was to show that on the night of the crime Garcia had not told Detective Byrne that Victory had kicked the police officer (2499-2500).

Victory's attorney did not propose to ask Detective Byrne whether Garcia had told the detective that the officer had been kicked. Although counsel's offer referred to "questions" and "answers" being taken down, the exhibits he referred to are not in "question and answer" form. Counsel did not propose to show that Detective Byrne had questioned Garcia about the officer being kicked, or had drawn Garcia's attention to that particular aspect of the incident. Victory's attorney did not point to any particular portion of either the handwritten notes or the typed version which he claimed showed that Garcia had previously said something inconsistent with his trial testimony.* Victory's attorney did not propose to show under what circumstances, when, or by whom the typed version of Detective Byrne's notes was prepared, the typed version being the material which omitted reference to the officer being kicked in the groin and which Garcia had not seen prior to trial (1178-79).** The trial judge rejected Victory's

* Victory's attorney did not expressly offer either the handwritten notes or the typed version into evidence.

** Counsel referred to both the handwritten notes and the typed version as omitting reference to the kick, but the handwritten notes, which Garcia read over that night and said were "close" to being accurate, did indicate that Garcia had said that the officer had been kicked in the groin.

limited offer of testimony from Detective Byrne. The judge indicated that, as in the case of the stenographic minutes, he did not regard the claimed omission to be inconsistent with Garcia's trial testimony.

Garcia was not the only witness at trial who described how the officer had been kicked in the groin by Victory and how, thereafter, the officer was crouched over in pain holding himself between the legs. Donna Garcia testified that "the man in the dark suit" (Victory) "brought his knee up, and just kicked the officer in the groin" (1338) with his knee (1339), that thereafter "the policeman was crouched over. He was hurt" (1339). She described how the officer was holding himself in the groin (1339), how "the policeman was all hunched over, doubled over with one hand right across his stomach" (1473; see also 1369-70, 1429-30).*

Theresa Gentry testified that Victory, from the front, and Bornholdt, from the rear, were "kicking and punching" the officer, "and the next thing I noticed that the policeman was all hunched over, doubled over with one hand right across his stomach" (1473).

Maureen LaGuardia testified that she left Arthur's briefly to get her car, which had been parked nearby (844-46). As she returned to pick up Mr. and Mrs. Garcia, and

* Victory's brief (p. 9) notes that Mrs. Garcia did not recall which way the officer and Victory were facing when the officer was kneed, and that she did not testify to some of the details which her husband observed. But, Mrs. Garcia was not as close to the action as her husband, and after the officer was kneed and the fighting started, she "was looking mostly at my husband" (1432), who "jumped in on top of the man with the tan suit" (Bornholdt) and was then "knocked right off" by Bornholdt (1370).

Theresa Gentry, she heard the sound of fighting (847-50). She saw the police officer trying to ward off Victory and using his nightstick (850-51). At that time, she saw the policeman's face: "his face was contorted in pain" (851, 852, 856-57).^{*} She could also tell the officer was in pain because "he wasn't walking" normally and he was "like bent over a little" (857).^{**}

On his direct appeal, Victory claimed evidentiary and constitutional error in the trial judge's rulings with respect to Francisco Garcia's testimony that the officer was kicked in the groin. Victory argued that the stenographic minutes and Detective Byrne's notes should have been admitted as "prior inconsistent statements" to show an "omission" in what Garcia had said at a prior time. This claim was unanimously rejected by the Appellate Division, First Department, and by the New York Court of Appeals, which stated:

"[T]he test of inconsistency, we have said, is not limited to outright contradictions between a witness' prior statements and his trial testimony; it includes, as well, omitting to mention critical facts at the prior time, which facts are later related at trial * * * The weight of authority holds, however, that a witness may not be impeached simply by showing that he omitted to state a fact, or to state it more fully at a

^{*} On cross-examination, Miss LaGuardia again testified that the officer's face was "contorting in pain" (1010). She also stated that Victory was in front of the officer (1010). Asked whether Victory struck the officer, she stated that at that time she "couldn't see what he was doing. His back was towards me." (1010)

^{**} There was testimony from the Associate Medical Examiner who did the autopsy that there were no visible signs of injury in the genital region of the deceased, but that there may be injury in that area which is not visible, that being a region which is particularly sensitive due to the presence of many nerve fibers (Gross: 1867-70).

prior time. It need also be shown that at the prior time the witness' attention was called to the matter and that he was specifically asked about the facts embraced in the question propounded at trial * * * The rule, we would say, accords with human experience recognizing that unless asked directly about a matter a person may quite normally omit it from a narrative description." 33 N.Y. 2d at 88-89 (citations omitted).

The District Court also rejected Victory's claim. The District Court noted that in the stenographic minutes, in which the kick is not mentioned, there was no specific question about that subject. With respect to Detective Byrne's notes of what Garcia had said, the District Court stated that the two versions are "somewhat ambiguous" (66a),* and that the notes do not mention Victory's kicking the officer. In the District Court's view, it would have been natural for Garcia to have mentioned the kneeling incident and therefore the omission in the stenographic minutes and in Detective Byrne's notes would have reflected on Garcia's credibility (69a).

The District Court held that any error "either does not rise to a constitutional level, or else despite constitutional error it was harmless beyond a reasonable doubt" (71a). Even if the attempt at impeachment had been permitted, "a number of factors tended to undercut the potential effect of such impeachment" (71a). The jurors would

* The handwritten notes stated, "I jumped on tan guys back & the tan one struck & kicked him the groin * * *." (19a). The District Court noted that, in the rest of the handwritten notes, the detective recorded Garcia's references to himself in the first person as "I" or "me" and not as "he" or "him" (66a). But, the District Court thought that the change in the pronoun from "him" to "me" in the typed version showed that the detective understood the word "him" to refer to Garcia, not to the patrolman (66a-67a).

have had before them ADA Dannett's handwritten notes which showed that Garcia had said that night that the officer had been kicked in the groin. In this connection, the District Court rejected the argument by Victory that Dannett's notes were not taken that night but were taken later in preparation for Garcia's grand jury testimony. Moreover, Garcia was not the only witness to the kneeling incident. Donna Garcia also described how the officer was kicked in the groin by Victory. And, all four witnesses described how the officer was bent over at that point in the incident. Furthermore, Victory's cross-examination was lengthy and included considerable readings from various portions of Garcia's pre-trial statements.

The District Court stated, with respect to Detective Byrne's notes, that "had Victory's attorney juxtaposed a reading of the precise impeaching matter with the foundation he had laid it is reasonable to conclude that the [trial] judge would have allowed it" (71a). The District Court also stated, with respect to the stenographic minutes, that "it appears that the judge's ruling resulted in part from impatience with the lengthy and inartistic cross-examination, highlighted by defense counsel's insinuation that Garcia *never* mentioned the kneeling incident prior to the Grand Jury" (71a-72a) (emphasis in original).

On this appeal, Victory renews the argument rejected by the District Court that Garcia never said on the night of the crime that Patrolman Varecha had been kicked in the groin. However, ADA Dannett's notes clearly show that Garcia did say that the officer had been kicked in the groin. Faced with that fact, Victory's brief argues that

ADA Dannett did not take these notes that night but took them weeks later in preparation for Garcia's grand jury testimony (Victory's Brief, pp. 36-38, and p. 34, 3rd footnote).

Victory's argument is frivolous. The record clearly shows that ADA Dannett had a conversation with Garcia on the night of the crime and took these notes during that conversation. The notes show that Garcia told him about the kick that night. ADA Dannett himself informed the trial judge at a bench conference that these notes were "taken in the police station that night" (1301), before he questioned Garcia in the stenographer's presence. Indeed, Victory's attorney never took issue with the fact that ADA Dannett's notes were taken that night. As the trial judge, in ruling on the admissibility of the stenographic minutes, pointedly said, Victory's attorney knew perfectly well that ADA Dannett's notes were taken that night (1300), although he insinuated otherwise in front of the jury.

There is no merit in the argument in Victory's brief that Garcia's testimony at trial shows that ADA Dannett's notes were not taken on the night of the crime. Garcia testified that ADA Dannett was writing when Garcia told him that the officer had been kicked in the groin (1288). Garcia's conversation with ADA Dannett took place "that evening" (1283), "sometime during the course of the evening" (1285).*

* Victory's brief takes out of context Garcia's testimony that he told ADA Dannett about the kick "before" Garcia testified before the grand jury. Victory suggests that "before" refers to immediately before the grand jury appearance (Victory's brief, pp. 37-38, and

(footnote continued on next page)

Since it is clear that on the night of the crime Garcia did say at least once that the officer had been kicked in the groin, there is no constitutional dimension to Victory's claim. Victory offered to prove only that Garcia did not also mention the kick at another time that night when Garcia was not asked about it.* That offer did not represent any substantial attempt to impeach Garcia's credibility. In view of the lack of substantial impeachment value in the material offered, the trial judge's evidentiary ruling was within a fair range of discretion. Moreover, even if admitted, the effect of the offered material on the credibility of Garcia's testimony at trial that the officer was kicked in the groin would have been slight, at most, and thus clearly insignificant in view of the testimony of Donna Garcia who described how the officer had been kicked in the groin. She, and two other witnesses as well, also testified that the officer was bent over holding himself between his legs, visibly injured.

p. 34, 3rd footnote). But, the quoted passages came after Victory's attorney had insinuated that Garcia had "never mentioned any kneeling or kicking *until the time that you were called before the Grand Jury*" (1286) (emphasis added). Garcia's testimony was that he told ADA Dannett about the kick *before* the time of his grand jury appearance, and that (as discussed in the text) this other time was on the night of the crime.

* Detective Byrne's handwritten notes indicate that Garcia told the detective as well as ADA Dannett about the officer being kicked in the groin. There is ample reason to regard the handwritten notes as correct since these were the notes which were taken contemporaneously during the detective's conversation with Garcia and which Garcia said afterwards were "close" to accurate. Even if it were assumed, however, that Garcia did not mention the kick to Detective Byrne that night—and Victory did not offer to put that question to the detective—the fact remains that Garcia told ADA Dannett about the kick that night. Therefore, there is little significance in whether or not Garcia mentioned the kick at another time that night when it was not shown that he was asked about it.

Proof of silence on a prior occasion is not generally admissible as a "prior inconsistent statement" under the rules of evidence "in most circumstances, silence is so ambiguous that it is of little probative force." *United States v. Hale*, 422 U.S. 171, 176 (1976). Moreover, "as a preliminary matter, the court must be persuaded that the statements are indeed inconsistent." (*Id.*) If the offering party fails to establish "a threshold inconsistency" between prior silence and trial testimony, then "proof of silence lacks any significant probative value and must therefore be excluded." (*Id.*) It is only when the circumstances are such that prior silence is the equivalent of an assertion that a fact does not exist, that proof of silence is considered sufficiently probative to warrant its admission as a "prior inconsistent statement." See Wigmore on Evidence, Sec. 1042 (Chadbourn Rev. 1970).

In this case, there were strong indications that the material offered by Victory was *not* the equivalent of an assertion by Garcia on the night of the crime that there had been no kick in the groin. Garcia was a disinterested bystander who had witnessed the killing of a police officer, whom he had tried to aid and who had collapsed in his arms after being shot. Afterwards, at the police station that night, he told an assistant district attorney about the killing, and said that the officer had been kicked in the groin during the incident.

Moreover, Garcia had witnessed a long, drawn-out incident with numerous actions and statements by Victory, Benholdt and Patrolman Varecha. In telling authorities a narrative about the crime shortly thereafter he would

naturally mention some but not all the details, particularly where his attention was not drawn to a particular subject. Later, at trial, testimony about the kick was material to the People's proof. But, on the night of the crime, it was not of obvious importance to Garcia, a lay person, to mention the details of the fighting which occurred. As far as Garcia was concerned he was telling the authorities not about a mere assault, but about a fatal shooting. The absence of questioning about the kick in the stenographic minutes indicates that ADA Dannett, too, did not at that point realize the importance of the kick about which Garcia had already told him. Obviously, the matter was simply inadvertently overlooked at that moment.

In these circumstances, since it was clear that Garcia did tell ADA Dannett that night about the kick, the trial judge had ample reason to rule that Victory had not established a "threshold inconsistency" between the offered material and Garcia's trial testimony. Moreover, Victory's offer of the material was marred by a false insinuation to the jury, so that the trial judge might well have thought that the offer was merely part of an exercise in deception. And, with respect to Detective Byrne's notes, Victory's offer of proof was so limited (see above, p. 19) that, as with the stenographic notes, no substantial probative value was apparent.* Indeed, as the District Court noted, if Victory's attorney had pointed to a particular portion of the Byrne notes as inconsistent with Garcia's trial testimony, it is

* Victory argues that the jury was left with the erroneous impression that Garcia had told Detective Byrne and ADA Dannett about the kick. In fact, Garcia had mentioned the kick to ADA Dannett, and Garcia may well have mentioned it to Detective Byrne as well. That Garcia stated that he "thought" he had mentioned the kick in the stenographic minutes and to Detective Byrne did not amount to any "bolstering" of his testimony.

reasonable to conclude that the trial judge would have allowed it.

The trial judge's ruling on admissibility was not dictated by state rules unrelated to the probative value of the offered evidence, but was a ruling that the offered material did not have sufficient probative value to warrant its admissibility for impeachment purposes. Such a ruling does not present a question of constitutional dimension unless the trial judge has exceeded a fair range of discretion and has cut off a substantial attempt at impeachment.

Thus, in *Davis v. Alaska*, 415 U.S. 308 (1974), where it was held that the right of confrontation was denied, a state rule of anonymity for juvenile offenders prevented the defense from conducting traditional cross-examination of a prosecution witness to show that the witness had reason to fabricate his testimony in order to shift suspicion away from himself. The witness was a potential suspect and was on probation for a juvenile offense. Shielded by the state rule, the witness boldly denied that he had ever been subject to law enforcement interrogation. 415 U.S. at 314. Thus, this Court has noted:

"serious damage to the prosecution's case could have been a real possibility if further cross-examination had been permitted." *United States v. Finkelstein*, 526 F. 2d 517, 529 (2d Cir. 1975).

Here, there simply was no such "real" possibility of "serious damage" to the People's case if the material Victory offered had been admitted.

Furthermore, in *Davis*, the trial judge was prevented by the state rule concerning juvenile offenses from permit-

ting the proposed impeachment even though he may have considered it to be of substantial probative value. However, where as in this case the trial judge's discretion was not restricted and he has reasonably determined that the offered material does not have sufficient probative value to be admitted into evidence for impeachment purposes, such an evidentiary ruling does not present a claim of constitutional dimension. This Court, rejecting a claim that cross-examination was unduly curtailed in violation of the right of confrontation, has stated:

"The extent of cross-examination of a witness is normally resolved by the trial judge in the reasoned exercise of his discretion." *United States v. Finkelstein*, 526 F. 2d 517, 529 (2d Cir. 1975).

This Court, even though "troubled" by a federal trial judge's exclusion of evidence offered by a defendant, nevertheless affirmed the conviction, stating:

"It has long been recognized that a defendant's right to present a full defense is a fundamental element of due process derived from both the Sixth and Fourteenth Amendments * * *. But rejection of testimony by the trial court does not necessarily mean that the defendant has been deprived of due process * * *. [Q]uestions relating to the admissibility of evidence, relevancy of proffered evidence and the scope of cross-examination are all questions to be determined subject to the rules of evidence and in doubtful cases subject to the discretion of the trial court * * *." *United States v. Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976).

Moreover, a broad range of discretion is particularly appropriate where a trial judge's ruling concerns the admissibility of prior inconsistent statements. As McCormick on Evidence states:

"In applying the criterion of material inconsistency reasonable judges will be likely to differ, and a fair range of discretion should be accorded to the trial judge." Sec. 34, p. 69 (2d ed. 1972).

In sum, the material Victory offered lacked substantial impeachment value. The trial judge's ruling that "threshold inconsistency" had not been established was within a fair range of discretion and does not warrant habeas corpus relief. Accordingly, the right of confrontation was not denied.

POINT III

New York's affirmative defense to felony murder is not unconstitutional [answering the brief for petitioner-appellee, Point III].

Victory claims that New York's affirmative defense to felony murder is unconstitutional. In light of the recent decision in *Patterson v. New York*, — U.S. —, 53 L. Ed. 2d 281 (1977), it is clear that this claim is without merit.

Under New York law, a person is guilty of felony murder when:

Acting either alone or with one or more other persons, he commits or attempts to commit [one of nine designated felonies*] and in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants. Penal Law, Sec. 125.25(3)

* "robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree."

New York provides that in a felony murder case it is an affirmative defense, which it is the burden of the defendant to prove by a preponderance of the evidence (Penal Law: 25.00(2)), that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury. Penal Law §125.25(3)(a)-(d)*

In the District Court, Victory's claim that New York's affirmative defense is unconstitutional, was based on *Mul-laney v. Wilbur*, 421 U.S. 684 (1975). The District Court, deciding the case before the Supreme Court's decision in *Patterson v. New York*, *supra*, did not pass on this claim.

Under *Patterson*, New York's affirmative defense to felony murder is constitutional, not only under the con-

* The full text of N.Y. Penal Law Sec. 125.25(3) is set forth in the Addendum to our main brief. The text of Penal Law, Sec. 25.00(2), provides:

"When a defense declared by statute to be an 'affirmative defense' is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

The jury was properly instructed concerning the difference between the burden on the prosecution and the burden on the defendants (see 3056-62; see also 2961-64, 2969-70, 3052-53).

trolling majority opinion, but under dissenting opinion as well. Previously, in *Mullaney v. Wilbur*, *supra*, the Court had held unconstitutional a Maine murder statute under which a defendant could rebut the statutory presumption that he committed the offense with "malice aforethought" by proving that he acted in the heat of passion on sudden provocation. In *Patterson*, the Supreme Court sustained the constitutionality of New York's affirmative defense of extreme emotional disturbance in an intentional murder case.

In distinguishing between the New York statute at issue in *Patterson* and the Maine statute at issue in *Mullaney*, the Court made it clear that the Due Process clause does not require a State to "disprove beyond reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." 53 L. Ed. 2d at 292. Rather, in the majority view, the State is required to prove beyond a reasonable doubt only the elements stated in the *definition* of the offense charged.

The constitutional defect in the Maine statute struck down in *Mullaney*, as clarified by the *Patterson* decision, was that the Maine statute made "malice, in the sense of absence of provocation, part of the definition of that crime. Yet malice, *i.e.*, lack of provocation was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion in sudden provocation." 53 L. Ed. 2d at 295.

Under the Court's decision in *Patterson*, it is clear that New York's affirmative defense to felony murder is con-

stitutional. The facts which must be established to convict in a felony murder case are the death, causation in the course of and in furtherance of an enumerated felony, and participation in the underlying felony. The State bears the burden of proof on these facts, unaided by any presumption against the defendant. As in *Patterson*, the affirmative defense at issue here does not serve to negative any facts which the State is regarded to prove in order to convict of felony murder. The affirmative defense to felony murder constitutes a separate issue upon which the defendant may be required by the New York legislature to carry the burden of persuasion without violating the due process claim. Indeed, the Court in *Patterson* noted that *Mullaney* was not intended to preclude the adoption of affirmative defenses to felony murder such as the proposal to permit the defendant to prove by a preponderance of the evidence the affirmative defense that the homicide committed was neither a necessary nor reasonably foreseeable consequence of the underlying felony. 53 L. Ed. 2d at 294-95, n. 15. Accordingly, the New York's affirmative defense to felony murder is not unconstitutional. Cf. *Farrell v. Czarnetzky*, — F. 2d — (2d Cir. September 30, 1977) (upholding the constitutionality of New York's affirmative defense which requires a defendant charged with first degree robbery to prove that the gun was inoperable or not loaded in order to reduce the charge to second degree robbery).

It is noteworthy that even under the view of the dissenters in *Patterson*, New York's affirmative defense to felony murder would not be considered unconstitutional. The dissent did not agree with the majority's view that the State is only required to prove facts required by the legislature's definition of the crime. 53 L. Ed. 2d at 299.

But, like the majority, the dissent regarded *Mullaney* as not condemning all affirmative defense but as a much more limited decision. Justice Powell, who was the author of the *Mullaney* opinion, stated in his dissent in *Patterson*:

“Central to the holding in *Mullaney* was our conclusion that heat of passion “has been almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide.” 53 L. Ed. 2d at 302.

In Justice Powell’s view, in order for an affirmative defense to be unconstitutional not only must the “the factor at issue (make) a substantial difference in punishment and stigma,” but it must also be shown that “in the Anglo-American legal tradition the factor in question historically has held that level of importance.” 53 L. Ed. 2d 302 (footnotes omitted). Under this view, “New ameliorative defenses about which the Court expresses concern, generally remain undisturbed by the holdings in *Winship* and *Mullaney* and need not be disturbed” in the view of the dissenters in *Patterson*. 53 L. Ed. 2d at 304.

Accordingly, under the dissenting opinion as well as the majority view, the affirmative defense to felony murder is constitutional. The enactment of Penal Law section 125.25(3) in 1965 constituted a break with tradition in order to confer a benefit upon defendants faced with a felony murder charge. A defendant in New York did not have that benefit before; nor does he have such a statutory benefit in virtually any other state in the nation.* As the

* As of 1972, other than New York, only Connecticut expressly provided an affirmative defense to felony murder. See La Fave & Scott, Criminal Law, 553, n. 51 (1972). The Connecticut affirmative defense, which tracks the language of New York’s Penal Law §125.25(3), is codified at Conn. Gen. Stat. Ann. §53a-54c.

New York Court of Appeals stated on Victory's direct appeal:

The revised Penal Law worked a significant change in prior law by providing an accomplice of a felon who kills an affirmative defense to a felony murder charge. Under the former Penal Law, none of the above-enumerated elements constituted a defense to the crime of felony murder where the defendant had the requisite felonious involvement. * * * The harshness of the rule in particular cases was apparent, and, hence, the instant provisions were incorporated in the revised Penal Law affording an accomplice of a felon who kills an opportunity to "fight his way out" of a felony murder charge. * * * [I]t introduces a heretofore unknown mitigation into the harsh common-law doctrine of felony murder, 33 N.Y.2d at 83-84, 85. (citations omitted).

Thus, the affirmative defense to felony murder does not relieve the State of the burden of proving beyond a reasonable doubt any fact that has historically been regarded as an essential element of the crime. Nor did Section 125.25(3) redefine felony murder in order to remove the burden of proof from the State and shift it to the defendant. At no time did the People bear the burden as to the factors in question. Indeed, even before *Patterson* was decided, a challenge based on *Mullaney* to the constitutionality of New York's affirmative defense to felony murder, was rejected. *Robinson v. Warden*, 419 F. Supp. 1 (E.D.N.Y.), *aff'd*, 538 F.2d 313 (2d Cir.), *cert. denied*, 97 S.Ct. 356 (1976).

Victory attempts to bring this case within the limits of *Patterson* by comparing the burdens that he claims are imposed on the defense by Sec. 125.25(3), with the burdens traditionally imposed on the prosecution in a common law

murder case. Victory's brief, pp. 48-50. In effect, Victory suggests that the affirmative defense here removes from the prosecution the burden of proving the mental elements of the crime. However, the difference in the prosecution's burden in a felony murder case, as distinguished from a common law murder case, is attributable not to the affirmative defense, but to the felony murder doctrine itself. The very definition of felony murder, codified in Penal Law Section 125.25(3), dispenses with the requirement that the prosecution prove intent to kill or depraved indifference to human life; the only intent that must be proved by the People is the defendant's intent to commit the underlying felony.*

Finally, we note that the affirmative defense to felony murder was not actually presented in this case. In particular the question of whether Victory was unarmed (Sec. 125.25(3)(b)), was not raised.** And, even considering the

* Victory also suggests that, if he had introduced evidence in support of the Sec. 125.25(3)(a)-(d) defense, that evidence may have had a circumstantial relevance to various crimes, including felony murder. Victory's brief, pp. 50-53. As to crimes with which Victory was not charged, the point is irrelevant. As to felony murder and the underlying felonies, the prosecution was in no way relieved of its traditional burden of proving the elements of felony murder.

As for the difficulties Victory claims he was under in proving the affirmative defense (Victory's brief, pp. 53-56), they do not render the statute unconstitutional. Victory's motion for severance was made on the eve of trial although Victory's attorney had known for several months about the "statement" by Bornholdt which formed the basis for the motion (*see* 124A-129A, 144A in volume 1 of the record; *see also* 25-27, 43). Victory's request for an advance ruling concerning cross-examination with respect to prior crimes was perfunctory (*see* 2233-34).

** We note that there was no difficulty in the way of Victory putting in issue the question of whether he was unarmed (Sec. 125.25(3)(b)). He was not required to testify himself or to call his co-defendant to put in issue this one of the four necessary components of the Sec. 125.25 defense. He could have raised this issue by eliciting testimony on cross-examination of Detective Jurgensen and Patrolman Corcoran, the officers who apprehended him.

prosecution's evidence, the question of whether Victory had no reasonable basis to believe that Bornholdt was armed, Sec. 125.5(3)(c), or intended to engage in dangerous conduct, Sec. 125.25(3)(d), was not presented. The charge that the jury could acquit if it believed the Sec. 125.25(3)(a)-(d) components to be established, was thus actually too favorable to the defense.

Accordingly, the constitutionality of the affirmative defense is not a proper ground for relief. *See Mullaney v. Wilbur, supra*, 421 U.S. at 704. In *Lopez v. United States*, 373 U.S. 427, 436-37 (1963), where error was claimed in the charge to the jury on the defense of entrapment, the Court stated, "Since the record does not disclose a sufficient showing that petitioner was induced to offer a bribe, we cannot conclude that he was prejudiced by the charge on burden of proof, even assuming that the burden called for was too great."

Conclusion

The order of the District Court, granting the petition for a writ of habeas corpus on the ground that the jury instructions were inadequate, should be reversed, and the petition should be dismissed.

Respectfully submitted,

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October, 1977

Service of 3 copies of the
within Brief is hereby
admitted this 12th day of
October 1977
Signed Henry Winstone

Attorney for Petitioner-Appellee

by Henry S. Stangor, Jr.,
as authorized
by H. Winstone

